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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LEDCOR BUILDERS, INC., Plaintiff and Appellant, v. JANEZ DEVELOPMENT, LLC, Defendant and Respondent.	D054968 (Super. Ct. No. 37-2008-00059767-CU-BC-NC)

APPEAL from a judgment of the Superior Court of San Diego County, William Dato, Judge. Affirmed.

In addition to hiring architects and contractors to construct improvements, frequently the owners or developers of real property also retain the services of construction managers. Typically, construction managers, acting on behalf of owners or developers, supervise the work performed by architects and contractors. Absent some express agreement, a construction manager does not owe the architects or contractors it

supervises a duty of care. Imposing such a duty of care on construction managers would interfere with a manager's primary obligation, which is to serve and protect the interests of the owner or developer. The risk of creating conflicting obligations not only protects a construction manager from liability in negligence to those whose work the manager oversees, it also bars any claim for equitable indemnity by an architect or contractor against a construction manager with respect to losses experienced by an owner or developer.

In light of these principles, the trial court correctly sustained without leave to amend the defendant construction manager's demurrer to plaintiff general contractor's complaint alleging claims for negligence and equitable indemnity. Accordingly, we affirm the judgment dismissing the general contractor's claims against the construction manager.

FACTUAL AND PROCEDURAL BACKGROUND

Ledcor Builders, Inc. (Ledcor), filed a complaint against Oceanside Pier View, L.P. (OPV), the owner of a construction project, and Janez Development, LLC (Janez), a construction management company. According to Ledcor's complaint:

On January 17, 2005, OPV hired Ledcor to act as the general contractor on a project OPV owned known as Oceanside Terraces. The contract between OPV and Ledcor was attached to the complaint.

At some unidentified point, OPV and Janez entered into a "Development Management Agreement" (Management Agreement). Although no copy of the Management Agreement was attached to the complaint and it does not otherwise appear

in the record, according to the complaint Janez was obligated to "meet with Ledcor to review construction progress, consider work in progress, and oversee the construction and major contract items such as change orders and claims [,] . . . to advise Ledcor of whether it believed any work performed by Ledcor was unsatisfactory, faulty, defective, or did not conform to the Contract Document." More generally, Ledcor alleged Janez was obligated to "observe, advise, and supervise Ledcor's work at the Project and ensure that it was properly, competently and timely performed."

The complaint alleged OPV breached the construction contract by failing to pay Ledcor on time, by providing defective plans, by refusing to give Ledcor sufficient time to perform tasks and by delaying Ledcor's performance under the agreement. Ledcor alleged it suffered $2.7 million in damages as a result of the breach.

In addition to contract-based claims it alleged against OPV, the complaint alleged a negligence cause of action and an equitable indemnity cause of action against Janez. In particular, the complaint alleged that by virtue of its agreement with OPV, and the breadth of duties Janez assumed over the project, and Ledcor's performance on the project, Janez owed Ledcor a duty to perform that oversight with due care. According to Ledcor, Janez breached that duty and as a result Ledcor was damaged. The complaint further alleged that OPV had sought damages against Ledcor and that Janez was required to equitably indemnify Ledcor for any damages OPV recovered from Ledcor.

Janez filed a demurrer to the complaint by which it alleged it did not owe Ledcor any duty of care or any obligation to indemnify Ledcor. The trial court sustained the

demurrer without leave to amend. Following entry of a judgment of dismissal, Ledcor filed a timely notice of appeal.

DISCUSSION

I

In reviewing an order sustaining a demurrer without leave to amend, we treat the pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972.) " 'We review the complaint de novo to determine whether [it] alleges facts sufficient to state a cause of action under any legal theory. [Citation.]' [Citation.]

"Where, as here, leave to amend was not granted, we determine whether the defect can reasonably be cured by amendment. The judgment is to be affirmed if it is proper on any lawful grounds raised in the [demurrer], even if the trial court did not rely on those grounds. We review the court's denial of leave to amend for abuse of discretion. [Citation.]" (*Ibid.*)

II

The substantive principles which in large measure govern our disposition of this case were set forth in two construction cases, *Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595 (*Ratcliff*) and *Jaffe v. Huxley Architecture* (1988) 200 Cal.App.3d 1188 (*Jaffe*).

In *Ratcliff* a school district, in order to accomplish the reconstruction of an elementary school, retained the services of an architect and construction managers. The

district's contract with the construction managers required them to indemnify the district for any economic losses the district suffered as a result of their fault, negligence or failure to perform their duties. However, the management contract expressly excluded as beneficiaries of any rights or obligations created by the contract.

The district experienced $1.934 million in cost overruns on the reconstruction project. The district sued the architect and the construction managers. The architect filed a cross-claim against the construction managers alleging claims for breach of contract, indemnity and negligence. The construction managers settled with the school district and the trial court found the settlement was made in good faith. Following confirmation of their settlement with the school district, the construction managers demurred to the architect's cross-complaint. The trial court sustained the demurrer without leave to amend and entered judgment in favor of the construction managers.

In affirming the trial court judgment, the Court of Appeal agreed with the trial court that the architect's negligence claim was untenable because the construction managers did not owe the architect any duty of care. (*Ratcliff, supra*, 88 Cal.App.4th at pp. 603-604.) The court found that, in general, courts are unwilling to impose a duty to prevent economic loss on third parties. (*Ibid*.) This reluctance stems from a conclusion that " '[a]s a matter of economic and social policy, third parties should be encouraged to rely on their own prudence, diligence and contracting power, as well as other informational tools.' " (*Id*. at p. 605, quoting *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 403 (*Bily*).)

Recognizing duty is in the end a question of public policy, the court considered the well-recognized factors set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650: the extent to which the defendant's transaction was intended to affect the plaintiff, the forseeability of harm, the certainty of harm, the connection between the defendant's conduct and the injury, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. The court found none of these factors supported imposition of a duty of care. The court attached little importance to the foreseeability of harm where, as in the case before it, the harm was an intangible injury. (*Ratcliff , supra*, 88 Cal.App.4th at p. 606.) The other *Biakanja* factors did not persuade the court to establish a duty of care: "The contract between [the construction managers] and [the school district] was not intended to affect [the architect]. Indeed as [one of the managers] points out, courts have refused to impose a duty to protect third parties to a contract for professional services from economic loss where such a duty would subject the professional service provider to a conflict in loyalties. [Citations.] [The construction managers] were expected to assist [the school district] in retaining and negotiating with other contractors, including architects. They were also expected to review the architect's cost estimates and designs. Accordingly, their duty was to [the school district], and any duty [to the architect] would represent a potential conflict of loyalty for [the construction managers]. Here [the school district] retained [the construction managers] with the principal purpose of protecting its own interests by ensuring that an expert manager supervised the construction project.

"Additionally, when a defendant's liability rests partially under the control of another party's conduct and the plaintiff is free to contract with the other party, the defendant's 'moral blame' and connection to the plaintiff's alleged injury is too remote to justify imposition of a tort duty. [Citation.] Here . . . the architect may protect itself against losses that the construction manager causes in its contract with [the school district]." (*Ratcliff, supra*, 88 Cal.App.4th at pp. 606-607.)

Finally, the court noted and found significant the fact that imposing a duty of care would undermine the good faith settlement the construction managers had made with the school district and the policy of protecting settling tortfeasors from further liability embodied in Code of Civil Procedure section 877.6, subdivision (c). (*Ratcliff, supra*, 88 Cal.App.4th at p. 607.)

As Janez points out, the principle discussed in *Ratcliff*, that no duty of care should be imposed where the plaintiff alleges only an intangible loss and recognition of the duty will subject the defendant to conflicting obligations, has been applied in a wide variety of other settings. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 344-345 [attorney owes no duty to third parties who purchased stock from his client]; *Bily*, *supra*, 3 Cal.4th at pp. 399-400 [auditor owes no duty to investor's in client]; *Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1204-1207 [consultant retained by public agency to consider environmental impacts of project does not owe project proponent duty of care]; *Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249, 251 [independent insurance adjustor owes duty to insurer which

hired it, no to claimant]; *Gay v. Broder* (1980) 109 Cal.App.3d 66, 75 [lender's appraiser owes no duty to borrower].)

The holding and rationale set forth in *Ratcliff* are also consonant with the result and reasoning we adopted in *Jaffe*. In *Jaffe* a condominium complex homeowners association sued the developers of the complex for construction defects. The developers paid the association $2 million in settlement of the association's claims and then brought an equitable indemnity claim against the association's board of directors. The developers alleged the board of directors had been negligent and that its negligence had contributed to the association's losses. In those circumstances, we declined to recognize any right of equitable indemnity: "Since the acts and omissions by the board which the Developers claim exacerbated the original defects were, in legal effect, the acts of the Association itself they could be asserted by the Developers against the Association under either the doctrine of comparative negligence [citation] or the doctrine of avoidable consequences [citation]. Thus, fairness to the Developers in this case does not depend on the availability of equitable indemnification. An apportionment of their culpability with regard to the acts and omissions of the board could be accomplished without the use of that doctrine and without suit being filed against the individual board members.

"Of equal consideration in our hesitancy to utilize the doctrine of equitable indemnity where it is legally unnecessary is our hesitancy to employ it where to do so will jeopardize or entangle a special relationship which strong policies dictate be preserved. The relationship between the homeowners association here and its board is such a special relationship. The board members of a homeowners association are seldom

professional managers, are very often uncompensated and most often are neighbors. Undoubtedly, the specter of personal liability would serve to greatly discourage active and meaningful participation by those most capable of shaping and directing homeowner activities.

"Even more fundamental is our observation that the special relationship here is fraught with potential conflict of interest should third parties be permitted to pit the Association against its directors by way of indemnity cross-complaints. Those conflicts of interest are exemplified here by the fact that the Association officers and directors have approved a settlement of the Association-Developers lawsuit. In this capacity they were obligated to act in the best interests of the Association in the face of a proposed settlement which purported to leave open the Developers' rights to sue them for indemnification. Although they were insulated from personal financial exposure by the Developers' agreement to limit damages to their errors and omissions insurance limits, in reaching even the latter agreement, the directors and officers risked permitting their personal potential liability interests to intrude into settlement considerations they were conducting on behalf of their fiduciary, the Association." (*Jaffe, supra*, 200 Cal.App.3d at pp. 1192-1193.)

III

In light of *Ratcliff* and the principles set forth therein, as well as the application of those principles in numerous other settings, it is plain that Janez did not owe Ledcor a duty of care.

As the court in *Ratcliff* noted, determining whether a duty of care exists is in the end a matter of public policy and we resolve that public policy question by considering the factors discussed in *Biajanja*. (*Ratcliff, supra*, 88 Cal.App.4th at pp. 605-606.) As in *Ratcliff,* here Ledcor has only alleged intangible harm. Thus, as in *Ratcliff,* foreseeability is of little importance here because although foreseeability " ' " 'may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm.' . . . It is apparent that reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury. . . ." ' [Citation.]" (*Ratcliff, supra*, 88 Cal.App.4th at p. 606, quoting *Bily*, *supra*, 3 Cal.4th at pp. 398-399.)

As in *Ratcliff*, here none of the other *Biajanja* factors support recognition of a duty. There is no allegation in the complaint the contract between OPV and Janez was intended to serve Ledcor's interests. Rather, according to the complaint, like the managers considered in *Ratlcliff*, Janez was obligated to protect OPV's interest by supervising Ledcor's performance of Ledcor's obligations to OPV. In this context, Janez's duty to OPV would be undermined if we recognized any potentially conflicting duty owed to Ledcor.

We also note that, like the architect in *Ratcliff*, Ledcor could have protected itself from harm caused by Janez by extracting from OPV some form of indemnification or release of liability for damage or delay caused by the construction manager. The availability of such contractual remedies undermines any "moral blame" that might be attached to Ledcor's losses and limits any direct connection between Janez's conduct and

those losses. (*Ratcliff, supra,* 88 Cal.App.4th at pp. 606-607.) The fact that Janez was retained after Ledcor did not materially impair Ledcor's ability to protect itself from damage caused by any construction manager OPV might eventually choose.

As it did in the trial court, on appeal Ledcor argues *Ratcliff* is distinguishable because Janez was given the power to pay Ledcor and in *Ratcliff* the manager had no such power. The power over payment was not determinative in *Ratcliff*. Although it made the connection between manager and architect more tenuous, in *Ratcliff*, as here, in the end no duty will be recognized because such a duty will create the potential for conflicting obligations.

The potential for conflicting obligations and the availability of defenses to OPV's claims also defeat Ledcor's indemnity claim. As we discussed in *Jaffe*, equitable indemnity will not be imposed where, as here, it will subject the proposed indemnitor to conflicting obligations and the indemnitor's conduct is attributable to the underlying claimant. Here, as in *Jaffe*, liability for indemnity would require that Janez protect both OPV's interests and Ledcor's, which, as OPV and Ledcor's claims against each other demonstrate, have plainly conflicted. Moreover, because Janez served as OPV's agent on the project, Janez's conduct is attributable to OPV and if it was deficient, that deficiency will limit OPV's recovery.

IV

Ledcor argues that it should have been permitted to amend its complaint to allege that it was an intended beneficiary of OPV's agreement with Janez and that in any event

Janez was guilty of negligent misrepresentation in dealing with Ledcor. The trial court did not abuse its discretion in denying Ledcor leave to amend.

"[O]n appeal the plaintiff does bear the burden of proving there is a reasonable possibility the defect in the pleadings can be cured by amendment." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 7-8.) Here, Ledcor has alleged Janez was retained by OPV to supervise Ledcor's work. We do not believe it is reasonable to expect Ledcor would ever be able to allege in good faith that OPV intended that Janez would owe Ledcor any duty that would conflict with Janez's duty to OPV. Thus Ledcor could not be expected to amend its complaint to either cure the defect in its negligence claim or set forth a viable claim that it was the third party beneficiary of OPV's agreement with Janez.

Admittedly, a claim for negligent misrepresentation is distinct from a claim for pure negligence, in that the class of misrepresentation plaintiffs is limited to those to whom or for whom the defendant's statements were made. (See *Bily*, *supra*, 3 Cal.4th at pp. 407-410.) This additional limitation on liability does not make a claim for negligent misrepresentation viable here. A claim for negligent misrepresentation would expose Janez to the same conflicting obligations as Ledcor's claim for negligence and for that reason may not be maintained.

Judgment affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.